INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	6
Reasons for granting the writ	7
Conclusion	14

CITATIONS

Cases:

Admiral Oriental Line v. *United States*, 86 F. 2d 201, 88 F. 2d 26	10
Alabama v. *United States*, 282 U. S. 502	11, 13
Arundel Sand & Gravel Co. v. *United States*, 66 C. Cls. 90	12
Conklin v. *R. P. & J. H. Staats Co.*, 161 Fed. 897	12
Dougherty Co. v. *Bader Coal Co.*, 244 Fed. 267	11
Eastchester, The, 20 F. 2d 357	11
Evans v. *United States*, 42 C. Cls. 287	9
Goodwin-Gallagher Sand & Gravel Corp. v. *Washington Bulkley, Inc.*, 31 F. 2d 112	12
Gulf Transit Co. v. *United States*, 43 C. Cls. 183	11
James McCue, The, 37 F. 2d 934	12
Keifer & Keifer v. *Reconstruction Finance Corporation*, 306 U. S. 381	11
Leather & Leigh v. *United States*, 61 C. Cls. 388, certiorari denied, 271 U. S. 660	9
Look v. *Portsmouth K. & Y. Street Ry.*, 141 Fed. 182	12
Lowe v. *United States*, 37 F. Supp. 817	9
Lynn v. *United States*, 110 F. 2d 586	9
M. & J. Tracy, Inc. v. *Marks, Lissberger & Son, Inc.*, 283 Fed. 100	12
Mascot, The, 28 F. Supp. 770	11
Moreno v. *United States*, 120 F. 2d 128	10
Pendleton et al. v. *United States*, 56 C. Cls. 222	10, 12
Philadelphia & R. Ry. Co. v. *Walker*, 139 Fed. 855	12
Schoonmaker-Conners Co., Inc. v. *New York Tidewater Gravel Corp.*, 11 F. 2d 470	11
Seguin, The, 34 F. 2d 226	11
Smith v. *Burnett*, 173 U. S. 430	11
Sterns Lumber Co. v. *J. H. Rice Co.*, 260 Fed. 434	12
Stevens v. *The White City*, 285 U. S. 195	11

Cases—Continued. Page

Tempel v. *United States*, 248 U. S. 121 11
United States v. *Atlantic Mutual Insurance Co.*, 298 U. S. 483 12
United States v. *Cornell Steamboat Co.*, 202 U. S. 184 12
United States v. *Dry Dock Savings Institution*, 149 F. 2d 917 10
United States v. *Jones*, 131 U. S. 1 8
United States v. *Sherwood*, 312 U. S. 584 ..... 7, 8, 9, 10, 14

Statutes:

Tucker Act (28 U. S. C. 41 (20), Act of March 3, 1887, c. 359, Secs. 1, 2, 24 Stat. 505, as amended) 10, 13, 15
28 U. S. C. 250 9

In the Supreme Court of the United States

OCTOBER TERM, 1945

No.

UNITED STATES OF AMERICA, PETITIONER

v.

PETTERSON LIGHTERAGE & TOWING CORPORATION, AND CONNERS MARINE CO., INC., AS OWNER OF SCOW "EVERETT FOWLER"

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General on behalf of the United States, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled case on November 5, 1945.

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 103–107) is reported at 60 F. Supp. 960. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 118–119) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 5, 1945 (R. 120). On

February 4, 1946, the time within which to file a petition for a writ of certiorari was extended by order of Mr. Justice Reed to and including March 6, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether the Tucker Act authorizes a Federal district court to implead the United States as a third party defendant in admiralty.

2. Whether a claim against the United States, as consignee of goods delivered by vessel, for failure to provide a safe berth for the vessel, is a claim founded upon contract or is a claim for damages "sounding in tort" within the meaning of the Tucker Act.

STATUTES INVOLVED

The relevant portions of the Tucker Act are set forth in the Appendix, *infra*, p. 15.

STATEMENT

Respondent, Conners Marine Co., Inc. ("libelant") filed a libel in admiralty in the United States District Court for the Southern District of New York, to recover $3,700 for damages sustained by its scow, the ***Everett Fowler,*** while under charter to respondent, Petterson Lighterage & Towing Corporation (the "charterer") (R. 3–4). The charterer filed its answer, conceding damage to the scow, but alleging that the damage was

caused by pounding from an Army stake boat, and was due to the fault of the scow captain supplied by the libelant, and to the negligence of Army representatives in charge of the stake boat (R. 5–9). The charterer filed with its answer a petition to implead the United States, the petition invoking alternatively the Suits in Admiralty Act and the Public Vessels Act, and making allegations similar to those in the answer (R. 10–14). The United States, in answer to the petition, admitted that the stake boat was a "public vessel" of the United States, but denied that the stake boat had caused the damage or that the United States was in any way at fault (R. 15–17).

The evidence adduced before the District Judge revealed the following facts: The charterer, by oral contract with the United States Army Transportation Corps, agreed to transport goods by water to the Brooklyn Army Base (R. 36–37, 50, 52). Upon receipt of orders from the Army, the charterer would supply boats for loading at a time and place designated by the Army, and after the boats were loaded, would tow them to the particular destination requested (R. 37). Where lighters towed to the Army Base were moored to the stake boat, the Army would then tow the lighters from the stake boat to the piers at the Army Base (R. 41, 60, 76). Arrival of a lighter at the Army Base was customarily reported by the scow captain to the Army Base or the charterer;

and the scow captain or the Army reported to the charterer when the lighter was light (R. 41).

The scow, *Everett Fowler,* was chartered from libelant by oral bare-boat charter, the scow captain being furnished and paid by libelant (R. 36, 47). In March 1943, upon oral orders from the Army, the charterer made the *Everett Fowler* and two other scows available at Greenville, New Jersey, for the loading of drums of Army owned gasoline to be transported to Piers 2 and 3 of the Brooklyn Army Base (R. 38, 50–51, 57). On April 4, 1943, the charterer's tug, *Bon,* towed the scows from Greenville to the Army Base (R. 51). Upon approaching the Base, an Army patrol boat directed the tug to moor the scows to an Army stake boat anchored approximately one-quarter mile from the piers (R. 57, 58, 62, 63). Deck hands from the tug tied up the scows (R. 59, 62), but the record fails to disclose whether the scows were secured directly to the stake boat or to other barges tied up at the stake boat (R. 58, 59, 61, 63, 67–68). The scow captain was not then aboard the *Everett Fowler,* having gone ashore at some earlier time (R. 59, 61).

On April 5, 1943, while the *Everett Fowler* was still secured, heavy weather arose, causing the scow to pound and ultimately suffer the damage in question (R. 51, 53, 54, 55). The scow captain advised the charterer by telephone that the scow

was pounding and should be shifted (R. 42, 51).[1] The charterer, in turn, so advised the office of the Army tug dispatcher by telephone, and was told it would be taken care of (R. 43, 51, 53). The charterer took no further steps to ascertain whether anything was done to protect the scow (R. 54).

On the foregoing evidence, the district court judge entered findings of fact and conclusions of law, holding that the charterer was negligent and liable for the damage to the scow (R. 106). The court, however, dismissed the petition against the United States, on the ground that the record failed to show that the Army stake boat had physically caused the damage, or that the Government had "in fact or even impliedly" assumed "responsibility for the safekeeping of the scow" (R. 105, 106). On appeal, the court below affirmed as to the charterer but reversed as to the United States (R. 118–120). While agreeing that the Public Vessels Act was inapplicable, since the damage was not shown to have been caused by the stake boat, the court below found "jurisdiction" over the "charterer's petition" in the Tucker Act "for breach by the United States, as consignee, of its contractual obligation to the charterer," and concluded that "the United States, because of its

[1] The scow captain did not appear as a witness and accordingly his testimony as to what transpired either at the stake boat or elsewhere is not available.

obligations to Petterson, is primarily liable, and Petterson secondarily" (R. 119).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Second Circuit erred:

1. In holding that the instant action could be converted into a Tucker Act suit in the appellate court.

2. In holding that the Tucker Act permitted the impleading of the United States and the assertion by libelant of the charterer's claim against the United States.

3. In holding that the United States was under a contractual obligation to the charterer to provide a safe berth for the *Everett Fowler*.

4. In holding that the United States negligently failed to provide a safe berth for the *Everett Fowler*.

5. In failing to hold that the charterer's claim against the United States was a claim for damages "sounding in tort" within the meaning of the Tucker Act.

6. In failing to remand the case to the District Court for appropriate findings of fact, as required by Section 7 of the Tucker Act.

7. In reversing the judgment of the District Court with respect to the United States, and holding the United States primarily liable to libelant.

REASONS FOR GRANTING THE WRIT

The instant suit commenced as an ordinary suit in admiralty by libelant against the charterer for damage to a "demised" scow. The charterer's petition to implead the United States asserted a claim under the Public Vessels Act for negligence on the part of the representatives of the United States Army in failing to care for the scow (R. 12–13).[2] The claim against the United States was tried and decided in the District Court and briefed and argued on appeal on this theory. The court below, while agreeing that the charterer had not made out a case under the Public Vessels Act, held that the case could be treated as a Tucker Act suit and concluded that the United States was liable thereunder. In this aspect, the decision of the court below is clearly erroneous, for (1) it is squarely in conflict with the decision of this Court in *United States* v. *Sherwood,* 312 U. S. 584, and (2) countenances a suit against the United States "sounding in tort" to which the United States has not consented.

1. In the *Sherwood* case, this Court held that a district court's jurisdiction under the Tucker Act "does not extend to any suit which could not be maintained in the Court of Claims" (312 U. S.

[2] While the charterer's petition invoked, alternatively, the Suits in Admiralty Act and the Public Vessels Act (R. 13), the United States in its answer conceded that the Army stake boat was a public vessel and the trial proceeded on that theory.

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at 591). The controversy there involved an attempt of a judgment creditor, by a Tucker Act suit against the United States and the judgment debtor, to recover upon the judgment debtor's claim against the United States for breach of contract. Observing that the Court of Claims "is without jurisdiction of any suit brought against private parties" and that adjudication of the judgment creditor's right to assert the claim of the judgment debtor was "prerequisite to any recovery upon the Government contract," this Court held that the suit was not within the jurisdiction of the Court of Claims, and therefore could not be maintained in the district court (312 U. S. at 588).

The decision of the court below is in direct conflict with this holding, for it permits a suit under the Tucker Act which could not be brought in the Court of Claims.[3] If the libel against the charterer were filed in the Court of Claims, it would be dismissed as a suit between private parties. Similarly, if libelant sought to join the United States and the charterer as defendants in a Court of Claims action, the suit as to the charterer would "be ignored as beyond the jurisdiction of the court." *United States* v. *Sherwood*, 312 U. S. 584, 588; *United States* v. *Jones*, 131 U. S. 1; *Lynn*

[3] In neither of the courts below was the *Sherwood* case mentioned by court or counsel. The point, of course, was not relevant on the theory on which the case was tried and argued.

v. *United States,* 110 F. 2d 586, 588 (C. C. A. 5); *Leather & Leigh* v. *United States,* 61 C. Cls. 388, certiorari denied, 271 U. S. 660; *Lowe* v. *United States,* 37 F. Supp. 817 (D. N. J.). While the United States would remain as a proper party defendant, the court would lack jurisdiction over the subject matter, for libelant has no contract claim of its own against the United States (cf. *Evans* v. *United States,* 42 C. Cls. 287), and any claim "sounding in tort" would be outside the court's jurisdiction. 28 U. S. C. 250; Appendix, *infra,* p. 15.

The court below held the United States liable to libelant, not upon any right which libelant had directly against the United States, but upon what the court believed to be the charterer's contractual right that the United States provide a safe berth for the scow (R. 119). But, the charterer's right to a safe berth was not contractual (see *infra,* pp. 10–13). However, assuming that it was, a prerequisite to allowing the libelant to assert it was the adjudication of libelant's claim against the charterer, a claim between private parties. The United States has not "given its consent to be sued in litigations in which issues between the plaintiff and third persons are to be adjudicated," and the action of the court below, in adjudicating such questions in a Tucker Act suit was clearly erroneous. *United States* v. *Sherwood, supra,* at 589; *Lynn* v. *United States,* 110 F. 2d 586 (C. C. A. 5); *Lowe* v. *United States,* 37 F. Supp. 817

(D. N. J.). Compare *Moreno* v. *United States*, 120 F. 2d 128, 130 (C. C. A. 1); *United States* v. *Dry Dock Savings Institution*, 149 F. 2d 917 (C. C. A. 2).[4]

2. The *Sherwood* doctrine aside, the decision below disregards the basic fact that under the Tucker Act the United States has not consented to be sued in tort.[5] The court below relied exclusively upon that clause of the Tucker Act, *infra*, p. 15, conferring jurisdiction over "claims * * * founded * * * upon any contract, express or implied", and held the United States liable for "breach by the United States, as consignee, of its contractual obligation to the charterer" to provide a safe berth for the scow (R. 119). We submit that there is no basis for the conclusion that the duty to care for the scow was contractual, nor did the court in its opinion suggest any such basis. In addition, the decision below in this aspect conflicts with that of the Court of Claims in *Pendleton* v. *United States*, 56 C. Cl. 222.

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[4] While *Admiral Oriental Line* v. *United States*, 86 F. 2d 201, 88 F. 2d 26 (C. C. A. 2), supports the decision below, it would appear to have been overruled by the *Sherwood* case.

[5] This rule finds expression in that portion of the Tucker Act conferring jurisdiction over claims "for damages * * * *in cases not sounding in tort*, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable." (Appendix, *infra*, p. 15).

Presumably, the court below had in mind a contractual obligation, expressed or implied *in fact*, for it is well settled that there is no jurisdiction under the Tucker Act to enforce contracts implied in law. *Alabama* v. *United States*, 282 U. S. 502; *Tempel* v. *United States*, 284 U. S. 121. The record fails to disclose any evidentiary basis for a finding (even if made) that the United States, by the oral contract of affreightment, in fact expressly or impliedly agreed to care for the scow.[6] In the absence of such agreement, the only obligation of the United States with respect to the scow was that of an ordinary consignee of goods delivered by vessel.[7] Such a consignee must, of course, afford a safe berth for the vessel. *Smith* v. *Burnett*, 173 U. S. 430; *The Eastchester*, 20 F. 2d 357 (C. C. A. 2); *Schoonmaker-Conners Co., Inc.* v. *New York Tidewater Gravel Corp.*, 11 F. 2d 470

[6] A consignee of goods, taking delivery by vessel, may, of course, contract regarding the caliber of berth to be supplied. See: *The Masoot*, 28 F. Supp. 770 (D. N. J.); *The Seguin*, 34 F. 2d 226 (D. Me.); *Dougherty Co.* v. *Bader Coal Co.*, 244 Fed. 267 (D. Mass.).

[7] The situation here involved is entirely different from those cases where the United States actually becomes a bailee for hire under a mutual contract of bailment, and assumes a contractual obligation to care for the property bailed. Cf. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 394; *Gulf Transit Co.* v. *United States*, 43 C. Cls. 183. Here, the charterer's "allegations and proof in respect of the agreement" of affreightment merely "were made by way of inducement to his real grievance, which was the damage to the [*Everett Fowler*] caused by negligence" of the United States. Cf. *Stevens* v. *The White City*, 285 U. S. 195, 200–201.

(C. C. A. 2); *M. & J. Tracy, Inc.* v. *Marks, Lissberger and Son, Inc.*, 283 Fed. 100 (C. C. A. 2); *Conklin* v. *R. P. and J. H. Staats Co.*, 161 Fed. 897 (C. C. A. 3).[8] But a damage suit for failure to do so does not rest upon contract, but is a suit "sounding in tort". *Pendleton* v. *United States*, 56 C. Cls. 222.[9]

This is graphically illustrated here, where the basis for the claim against the United States has all the elements and indicia of an ordinary tort—damage to property arising from the negligence of Government representatives. It was just such liability that the United States sought to avoid by withholding consent to be sued in cases "sounding in tort". The claim in the instant case is in sharp contrast with other types of claims against the United States in admiralty, such as claims for salvage (*United States* v. *Cornell Steamboat Co.*, 202 U. S. 184) or for contribution in general average (*United States* v. *Atlantic Mutual Insurance Co.*, 298 U. S. 483). There liability does not rest

[8] See also *Look* v. *Portsmouth K. & Y. Street Ry.*, 141 Fed. 182 (D. Me.); *Goodwin-Gallagher Sand & Gravel Corp.* v. *Washington Bulkley, Inc.*, 31 F. 2d 112 (E. D. N. Y.), affirmed, 31 F. 2d 115 (C. C. A. 2); *Sterns Lumber Co.* v. *J. H. Rice Co.*, 260 Fed. 434 (D. Me.). Cf. *The James McCue*, 37 F. 2d 934 (S. D. N. Y.); *Philadelphia & R. R. Co.* v. *Walker*, 139 Fed. 855 (D. N. H.).

[9] In *Arundel Sand & Gravel Co.* v. *United States*, 66 C. Cls. 90, where the Government was absolved of negligence in providing a berth for a barge delivering sand, the Government did not challenge, and the court's opinion did not consider, the question of jurisdiction, probably because the record clearly shows that the claim was founded upon contract.

upon fault or negligence of Government officers, but rather upon settled principles of admiralty, allowing compensation for services rendered (in the case of salvage) or requiring the sharing of losses sustained in a common venture at sea (general average). In the instant case, the gravamen of the action is property damage due to alleged negligence of Government representatives, and the adjudication essentially turns upon ordinary tort principles. It is submitted, therefore, that the charterer's claim for damages is one "sounding in tort", beyond the jurisdiction of a district court under the Tucker Act.[10]

3. The questions presented are of substantial importance to the administration of the Tucker Act. If the decision below is allowed to stand, the United States in the innumerable instances in which it is consignee of goods shipped by water, may find itself subject to suit for property damage arising from negligence of its employees. We are advised that in the New York area alone there are approximately one hundred outstanding

[10] Even if a damage suit against a consignee for failure to provide a safe berth does not "sound in tort", within the meaning of the Tucker Act, it may be considered as being based upon an obligation implied in law, and therefore beyond the jurisdiction of a district court. As Justice Holmes noted in *Alabama* v. *United States*, 282 U. S. 502, 507, when referring to claims for "damages in a case not sounding in tort", there are "few cases of this sort that cannot be brought under the head of a contract implied in law; and, [it] is established that such contracts are not within the jurisdiction of the Court of Claims."

claims against the United States of the character involved in the instant case and heretofore deemed not actionable because "sounding in tort". Unless the decision below is reviewed by this Court, such claims will undoubtedly be made the basis of Tucker Act suits against the United States. Moreover, the district courts, in adjudicating these and other claims against the United States, will in all probability follow the impleader practice permitted by the decision below, in disregard of the *Sherwood* case. This will cause needless and wasteful litigation, should such impleader practice be subsequently disapproved.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

MARCH 1946.